

In the Matter of License No. 179584 and all other Licenses,
Certificates and Documents

Issued to: WARREN P. TOBEY

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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WARREN P. TOBEY

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

By order dated 26 August 1955, an Examiner of the United States Coast Guard at Baltimore, Maryland, suspended License No. 179584 issued to Warren P. Tobey upon finding him guilty of misconduct based upon a specification alleging in substance that while serving as Second Officer on board the American SS LIBERTY BELL under authority of the license above described, on or about 16 June 1955, while said vessel was in the port of Bombay, India, he assaulted and battered the First Assistant Engineer, Dennis Powers, with a bottle.

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by an attorney of his own choice and he entered a plea of "not guilty" to the charge and specification proffered against him.

Thereupon, the Investigating Officer and Appellant's counsel made their opening statements and the Investigating Officer introduced in evidence the testimony of First Assistant Engineer Powers.

In defense, Appellant offered in evidence his sworn testimony as well as the testimony of Boatswain Vickerman, Third Cook Lavelock and messman Anderson. Appellant testified that he was attacked by Powers with a catsup bottle and Appellant's left hand was injured either when he attempted to defend himself or when he took the broken top of the catsup bottle away from Powers after Powers struck Appellant with it.

The Examiner received in evidence a certified copy of an entry in the Official Logbook of the LIBERTY BELL. This entry pertains to the incident in question.

At the conclusion of the hearing, having heard the argument of

Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusions, the Examiner announced his decision and concluded that the charge and specification had been proved. He then entered the order suspending Appellant's License No. 179584, and all other licenses, certificates and documents issued to Appellant by the United States Coast Guard or its predecessor authority, for a period of three months.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On 16 June 1955, Appellant was serving as Second Officer on board the American SS LIBERTY BELL and acting under authority of his License No. 179584 while the ship was in the port of Bombay, India.

At about 0800 on this date, the Master, Appellant and First Assistant Engineer Powers were in the Officers' Saloon eating breakfast at their respective tables. The Mates' table was on the starboard side of the forward part of the saloon, the Engineers' table was on the port side and the Master's table was between the other two. There were two chairs aft of each table and a cushioned settee, attached to the forward bulkhead, running athwartship between the port and starboard bulkhead. The starboard bulkhead was between two and three feet from the starboard end of the Mates' table. The settee provided unbroken table seating for all three tables. There was a fan on the starboard bulkhead near the Mates' table and approximately five feet above the deck.

Appellant was sitting on the settee near the outboard side of the starboard table. He conversed with the Master and complained to him about the quality of the food on the ship. Appellant told the Master that Powers, among others, had expressed objection to the food. After the Master left the saloon, Appellant and Powers were the only persons there except messman Anderson who passed through in the performance of his duties.

Powers told Appellant that he should not have used Powers' name as one of the complainants about the food. This lead to a heated argument and Powers walked over to the starboard end of the table where Appellant remained seated on the settee. Appellant arose to a half-standing position between the settee and the table, reached across the table and struck Powers on the head with a bottle of catsup which Appellant held in his left hand. Powers head was cut by the blow. The bottle broke and severely cut Appellant between the thumb and index finger of his left hand. Appellant transferred the remaining portion of the bottle to his

right hand and delivered blows which cut Powers on his left arm. Powers' lip was also cut or split during the fracas. Messman Anderson heard the noise from the pantry. During the course of this incident, the fan guard was bent so that the blades of the fan struck the guard and made a loud noise.

The Boatswain heard the noise caused by the fan and he entered the Officers' Saloon at approximately the same time as the Third Cook arrived on the scene. Neither of the latter two seamen saw any blows struck. Appellant was on the settee and Powers was leaning over the Mates' table from a standing position. Blood and catsup were scattered around the saloon. Appellant still held the top of the bottle in his right hand. The Boatswain turned the fan off and then further separated the two injured men. After Powers and Appellant were given first aid treatment, they were hospitalized for periods of seven and eight days, respectively, before returning to their regular duties on the ship.

There is no record of prior disciplinary action having been taken against Appellant during his 31 years at sea.

BASIS OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant denies the truth of a considerable portion of Powers' testimony at the hearing. Appellant contends that it would have been impossible for him to rise to a standing position from the settee; Powers struck the fan guard with the bottle and broke the bottle when he raised it to strike Appellant; he defended himself with his hands and feet; Powers cut his arm on the broken bottle top held by Appellant while he was defending himself against attack by Powers; the latter's lip was cut when he was kicked by Appellant; and Powers made statements to the Boatswain and another seaman that Powers assaulted Appellant by jumping or diving across the table at him. Appellant requests that these seamen be questioned concerning the admissions made to them by Powers.

OPINION

The result in this case rests largely upon whether Appellant's or Powers' testimony is correct as to what occurred when they were alone in the Officers' Saloon. The Examiner accepted Powers' version of the incident and rejected the testimony of Appellant that Powers was the aggressor. Since this is a case which must be resolved by a choice between the directly conflicting testimony of two witnesses, I accept the determination by the Examiner who was in the best position to decide questions of credibility since he saw and heard the witnesses.

The admitted fact that Appellant had the neck of the bottle in

his hand when others entered the saloon is strong circumstantial evidence against him. There is little likelihood that Appellant could have gotten this small ragged-edged piece of glass out of the hand of Powers while Appellant's movements were limited by the presence of the table in front of the settee. But it seems apparent that Appellant could have risen to a partially standing position in order to strike Powers on the head with the bottle. The entry in the ship's Official Logbook supports Powers' claim that he was injured on his head as well as on his face and left arm.

The fan guard which was bent during this incident could have been bent by Powers striking it with his head or by it being struck by the bottle. The nature and position of this guard, however, would lead one to believe that it was bent by Powers' head rather than by a bottle, presumably when he recoiled from Appellant's attack. Further, it seems more probable that a catsup bottle would be deflected by the guard without breaking the bottle or bending the guard when the bottle was being swung and was near the top of the swing. Speculation on this circumstantial evidence seems pointless, however, when the cut on Powers' head and his dazed condition both point to a hard blow being delivered on his head with an object such as a bottle rather than the striking of the fan guard by Powers' own movement. Appellant did not submit any testimony similar to his contention on appeal that Powers broke the bottle on the fan when he raised the bottle to strike Appellant. Nor was the Boatswain questioned at the hearing with respect to the admissions by Powers which Appellant now claims were made to the Boatswain and the other seaman who escorted the two injured men to the hospital. Appellant must have known of any such admissions at the time of the hearing because both he and Powers were taken ashore in the same launch.

It is not likely that Powers would have been cut on the arm by the remains of the bottle if Appellant was leaning back and kicking at Powers to ward off his blows. Also, the latter method of defense seems improbable in view of the undisputed fact that Appellant had the neck of the broken bottle with which to defend himself if necessary, and had the table in front of him, which must have made any kicks high enough to hit Powers' face extremely difficult to deliver.

For these reasons, it is my opinion that the order of three months suspension was entirely justified and might well have been one of greater severity.

ORDER

The order of the Examiner dated at Baltimore, Maryland, on 26

August 1955 is

AFFIRMED.

A. C. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 4th day of January, 1956.